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No. 101

In the
Supreme Court of the United States

OCTOBER TERM, 1966.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT

The Federal Trade Commission, on June 12, 1964, found that Universal-Rundle Corporation had violated Section 2(a) of the amended Clayton Act, 15 USC 13(a), by granting an average truckload discount of 10% from its published wholesaler net prices on the sale of certain items of its "U-R" brand plumbing fixtures.[1] A cease and desist order, nationwide in scope, was entered prohibiting any price discrimination between competing purchasers of "U-R" fixtures.

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[1] The Commission dismissed the charges pertaining to the sale of fixtures to Sears, Roebuck and Co., finding such fixtures were not of like grade and quality as the "U-R" brand fixtures. (R. 30-34)

The FTC's finding of violation was limited to a showing that in 1957 respondent had three customers in the Philadelphia and Camden trading areas who, on seven occasions, bought in truckload quantities and received truckload discounts, while there were seven other "competing" customers who purchased fixtures in less than truckload quantities and paid higher wholesaler net prices. According to the Commission, truckload quantities were beyond the buying capabilities of these seven customers, (R. 34-45). Five of these seven customers also purchased plumbing fixtures from one or more of respondent's competitors. (R. 250; 384; 408; 480-482) During trial of this case before the Hearing Examiner the names of 13 customers of one competitor (R. 480) and 10 of another competitor (R. 482) located in the Philadelphia and Camden areas were identified.

On July 20, 1964 respondent asked the Commission to stay the effective date of its cease and desist order for at least 18 months and in that interval for the Commission to investigate and take whatever action it deemed appropriate with regard to respondent's six major competitors who were also engaging in the practice of granting truckload discounts. In support of its petition for such a stay respondent made the following showing:

1. The plumbing fixture industry is highly concentrated. Four of respondent's competitors as a group accounted for 66% of the total industry sales. The leading manufacturer's share was 32%, while respondent's market share, as affected by the order, 5.75%, was one of the smallest in the industry. (R. 50)

2. Each of the respondent's six major competitors offered truckload discounts which averaged approximately 18% below their published wholesaler's net price for

identical fixtures purchased in less than truckload quantities. (R. 493-499)

3. Respondent demonstrated the severe financial losses incurred in the operation of its business in the three years immediately preceding entry of the cease and desist order, as contrasted to the showing of substantial profits by each of the six competitors. (R. 52; 500-518)

4. Respondent, through the affidavit of its Vice President in Charge of Sales, informed the FTC of the following: (a) Each of the six competitors distributed plumbing fixtures in the larger trading areas of the country in the same manner in which respondent sold its products; (b) some of its competitors were granting truckload discounts in certain areas of the country on all their plumbing fixtures at 15% to 20% below the price for less than truckload quantities; and (c) based upon his knowledge of the plumbing fixture industry, should the FTC refuse to stay the order, pending some corrective action by the Commission concerning the competitors' truckload discount practices, respondent's market share would be substantially decreased and the company would incur further financial losses. (R. 54-55)

In its petition for a stay, respondent did not ask the Commission to postpone entry of the cease and desist order until its competitors were placed under similar orders; nor did respondent request that enforcement of the order against it be made contingent upon the FTC filing complaints or obtaining cease and desist orders against respondent's competitors. So confident was respondent that the FTC would treat it in a fair and equitable manner and follow its announced policy of correcting industry-wide practices on an industry-wide basis, that respondent agreed to waive its statutory right to judicial

review if the requested relief were to be granted. (R. 46-47)

The FTC on August 4, 1964, declined to grant the requested relief on the ground that respondent's showing was insufficient to warrant the Commission's taking any action. In denying the stay, the Commission made no finding that there might possibly be an adverse effect upon competition in the secondary line should the effective date of the cease and desist order be postponed, which would outweigh respondent's predicted competitive impairment in the primary line. In its order denying respondent's request, the FTC simply took the position that before it would be justified in commencing an investigation of respondent's competitors, it would be necessary for respondent to submit to it evidence probative of every element of a *prima facie* case and, in addition, the FTC indicated a need for evidence tending to negate the existence of possible affirmative defenses. (R. 62-67)

Nor did the FTC in refusing to investigate respondent's competitors indicate that it had considered the possible impact on the secondary level of competition, which might result from these competitors truckload price discriminations, which, as previously shown, averaged approximately 18%, even though the Commission had found in the present case that price competition in the distribution of plumbing fixtures was "extremely keen" (R. 40), and differentials averaging approximately 10% were sufficient to bring about the effect proscribed by statute. (R. 44)

After entry of the FTC's order of August 4, 1964, respondent continued its efforts through a series of correspondence with the staff of the Commission to have some action taken to correct this industry-wide practice.

(FTC Br., Appendix C, pp. 35-54) On March 4, 1964 respondent furnished the Commission names of customers located in several trading areas of the country of the two largest producers in the industry. (FTC Br., Appendix C, pp. 52-53)

By letter dated April 19, 1965 the Commission's staff notified respondent's counsel that any investigation of Section 2(a) violations by respondent's competitors would conflict with a pending investigation by the Department of Justice and, therefore, the Commission would not then (April 1965) investigate. (FTC Br., Appendix C, p. 55)[2]

The FTC admitted in its brief in the Court of Appeals that "specific information" had been furnished "tending to show current violation of Section 2(a) by two of [respondent's] competitors. . . ." (R. 574). But the FTC informed the court it would not investigate because of a possible conflict with the Department of Justice.

In reviewing the Commission's refusal to stay the effective date of its cease and desist order and the Commission's refusal to take any action with regard to respondent's competitors, the Court of Appeals ruled that respondent had made a "strong showing" that its competitors were currently engaging in the same practice as

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[2] The FTC's letter of April 19, 1965 was received by respondent's counsel after the staff of the FTC had been advised that certain correspondence between counsel (letters dated November 16, 1964 and December 2, 1964, FTC Br., App. C, p. 35-38) had been referred to in respondent's brief in the lower court. Since respondent's brief had already been sent to the printer when the FTC's letter of April was received, an addendum summarizing the letter and the circumstances surrounding its receipt was filed in the Court of Appeals. This addendum is set forth as Appendix C to this brief.

was found to be illegal when done by respondent. The Court of Appeals ruled that under these circumstances the Commission's flat refusal to take any action concerning respondent's competitors, who were granting greater discounts, was a patent abuse of its administrative discretion because such a refusal was inconsistent with the overriding policy of the Clayton Act, stating:

> "We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public." (R. 573)

The Court of Appeals further ruled that respondent's showing was sufficient to place upon the Commission a duty to investigate and that it could not condone the Commission's refusal to perform that duty. It also ruled that the pendency of a Department of Justice proceeding did not serve to excuse the Commission's refusal to investigate. (R. 574-575)

The Seventh Circuit reserved its ruling on the merits of the case and remanded this proceeding to the Commission with instructions to grant the alternative relief requested by respondent, that is, the staying of the effective date of the cease and desist order pending investigation by the Commission of respondent's competitors.

SUMMARY OF ARGUMENT

1. The Commission acted arbitrarily and abused its discretion in denying the requested stay and in refusing to investigate respondent's competitors for each of the following reasons:

A. It is an abuse of administrative discretion for an agency to take action which is inconsistent with the Congressional policy sought to be attained by the legislation entrusted to the agency for enforcement.

The Court of Appeals ruled that the FTC's action was contrary to the underlying purposes of the Clayton Act in that the FTC's decision to ignore respondent's larger competitors would benefit, not the public, but the "giants in the field." Such action if not subject to a judicial review would thwart the Congressional purpose of protecting, rather than impairing small corporations, such as respondent, at the seller level of competition.

The Court did not substitute its views on this issue for those of the Commission, since the Commission itself gave no consideration to the possible impact of its order at the seller level, nor did the Commission consider the probable result of its action at the secondary level of competition, especially among those buyers handling plumbing fixtures of respondent's competitors.

It was therefore proper for the Court to remand this cause to the Commission in a situation where, in the absence of a contrary determination, or any determination by the agency on this question, the Court perceived that the result of the agency's action would be inconsistent with the statutory purpose.

B. The FTC's action in denying the requested stay was an abuse of discretion because the flat refusal to investigate respondent's competitors precluded the Commission from obtaining essential information prerequisite to the proper exercise of its administrative discretion.

This Court in *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411 (1958), clearly stated that in circumstances such as those presented in the instant case the FTC has a duty to investigate and find out whether an allegedly illegal practice is industry-wide in scope, before deciding whether to proceed by bringing individual cases or by bringing industry-wide proceedings. In this case, the FTC refused to undertake this duty, thus precluding itself from making a knowledgeable determination as to whether the order against respondent should have been enforced immediately or stayed.

An administrative agency abuses its discretion when it attempts to exercise that discretion without knowledge of essential facts.

C. The Commission's refusal to grant the requested stay was an abuse of discretion because that refusal was arbitrary when judged in the light of the Commission's own announced standards.

The Commission in its official policy statements to the Congress has stated that whenever a law violation is identified, the Commission, instead of applying the simple method of halting an individual violator, undertakes to find out if the violator's competitors are doing likewise. The FTC's policy pronouncements and its action denying the stay and refusing to investigate this respondent's competitors are simply irreconcilable.

The Court of Appeals decision merely calls upon the FTC to apply that same policy which the FTC has al-

ready been consistently following in a case where no reason was present which indicated that an exception to that policy was required. The FTC's deviation from its announced policy and consistently applied method of procedure was arbitrary and unfair.

2. There is no conflict between the Court of Appeals decision in this case and this Court's prior decision in Moog Industries, Inc. v. FTC.

In *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958), there was no claim that the Commission had refused to investigate those respondent's competitors. On the contrary, the auto parts industry, in which those respondents competed, had already been subjected to an industry-wide FTC investigation and numerous complaints as well as cease and desist orders had been already issued.

In contrast, although a decade has elapsed since the onset of the alleged discriminations in the plumbing fixtures industry, the Commission has acknowledged that it has not commenced a single investigation save for that of this respondent.

This case, unlike *Moog* does not involve an attempt by the court below to supervise the FTC's timetable of enforcement, but rather involves the propriety of the Commission's determination to proceed against a single respondent and ignore all the remaining competitors in the industry, despite a strong showing that the remaining competitors were engaging in the same practice alleged to be illegal.

3. The court below did not err by reserving its judgment on the validity of the cease and desist order.

The FTC's argument that the court below erred by failing to first pass on the validity of the cease and desist order before ruling on the Commission's action denying the stay, is premised upon what equates to a claim, that the FTC is entitled to a test case before an industry-wide investigation would be appropriate.

This is flatly contrary to the FTC's consistently employed approach used in enforcing the price discrimination law in other industries. Moreover, it is diametrically opposed to the official policy pronouncements of the Commission and the statements of its Chairman and other present members of the FTC, which decry such a tactic as unfair.

Finally, the Commission does not in its brief demonstrate one unique or even unusual legal theory or evidentiary problem which would justify the claimed need for a test case in the industry here involved.

4. The claim that the FTC is now powerless to investigate respondent's competitors because of pending Department of Justice proceedings under the Sherman Act is wholly lacking in merit.

The FTC's grounds for refusing to investigate respondent's competitors were limited to a claimed insufficiency of the showing made by respondent that its competitors might be violating Section 2(a) of the amended Clayton Act. By the time this case reached the Court of Appeals the FTC was forced to acknowledge that the cited grounds were no longer valid with regard to at least two of respondent's largest competitors.

The FTC then sought to justify its continued refusal to investigate by claiming that such action on its part might conflict with an investigation then being conducted by the Department of Justice.

The claimed conflict supposedly is the problem which might arise should the FTC inadvertently confer immunity on individuals which the Department of Justice might desire to prosecute criminally for suspected violations of a different antitrust statute. The FTC's attempted justification by virtue of this extraneous circumstance is wholly without merit because the FTC has at least four investigative avenues available to obtain the necessary information, not a single one of which could possibly involve the least danger of conferring immunity on an individual.

The FTC itself must recognize the invalidity of this belatedly raised excuse, since it has advised respondent that investigations by it of another plumbing manufacturer under other sections of the amended Clayton Act are presently being undertaken.

ARGUMENT

1. The question which the Court must resolve is whether the FTC in connection with its order of August 4, 1964 denying respondent's petition for a stay of enforcement acted arbitrarily and abused its discretion.[1] This question must be answered in the affirmative for the three following reasons:

A. It is an abuse of administrative discretion for an agency to take action which is inconsistent with the Congressional policy sought to be attained by the legislation entrusted to the agency for enforcement.

In this case, the Seventh Circuit ruled:

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[1] Petitioner couches the question presented in terms of the court of appeals having exceeded its authority and usurped the Commission's function by making a discretionary determination which the law properly reserves to the Commission. It accuses the court below of undertaking ". . . for itself the Commision's task of finding economic facts and evaluating competing economic interests." (FTC Br., p. 8)

Respondent submits that the decision of the court below must be viewed in a fundamentally different light. The court's decision does not stand for or countenance the proposition that reviewing courts are free to substitute their own discretionary determinations in place of those arrived at by an administrative agency. This is not what the court did. What the court did was simply to remand a case back to the Commission so that it might properly exercise its administrative discretion in a situation where the court was convinced that the Commission had acted arbitrarily and abused its discretion in the first instance. To correct an arbitrary abuse of discretion on the part of an administrative agency is a proper function for a reviewing court and well within such court's authority. The prior decisions of this Court and the explicit provisions of the Administrative Procedure Act render this principle beyond dispute. Section 10(e), Administrative Procedure Act, 5 U.S.C. 1009(e); *Moog Industries Inc.* v. *F.T.C.*, 355 U.S. 411 (1958).

". . . We cannot, in the name of an antitrust prosecution, lend our support to the sacrifice of a comparatively small manufacturer when its larger and more guilty competitors are not prosecuted.

"We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public." (7th Cir. Opin., R. 573)

In the above-quoted passage, which is the very heart of the court of appeals decision, the court expresses its inability to perceive in the Commission's action denying the requested stay, a plan of operation which even remotely resembles conformity with the basic purposes of the antitrust laws. The court makes it plain it believes just the opposite is true—the Commission's challenged action would frustrate rather than further the objectives of those statutes.

It is well settled that it is a patent abuse of administrative discretion for an agency to make a decision which is inconsistent with the over-riding legislative purpose sought to be attained by the enactment of the statute whose enforcement Congress has entrusted to the agency. In *N.L.R.B.* v. *Brown,* 380 U.S. 278 (1965) this Court ruled:

"Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." (380 U.S. 278, 291-292)

In the same vein this Court has pointed out that the permissible latitude for the exercise of discretion by an administrative agency is not so unlimited so as to permit an agency to "lose sight of the law." *General Protective Committee, Etc.* v. *SEC*, 346 U.S. 521, 536 (1954). This Court has also ruled that agency actions which do not conform to the overriding standard laid down by Congress for the agency involved are not legitimate exercises of administrative discretion. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 at 167 (1962).

The case at bar was brought by the Federal Trade Commission under the anti-discrimination provisions of the amended Clayton Act. It cannot be disputed that Congress did not pass the Clayton Act for the purpose of conferring advantage on the "giants in the field". On the contrary, it has long been recognized that the overriding statutory purpose sought to be attained by that enactment was two-fold. One goal was to protect the small merchant from the competitive disadvantage of having to pay higher prices than his more financially powerful competitors, primarily the large chain store operations, *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); a second goal was to protect competition at the seller level where Congress feared that the competitive opportunities of smaller manufacturers might be endangered by the ability of larger corporations to use economic leverage through discrimination to impair them competitively. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

These twin objectives have one common denominator, the desire to protect the smaller competitor, whether at the buyer or seller level, from his financially more powerful competitors. The underlying premise from which this legislation springs is the Congressional belief that the

public interest will best be served by preserving a multiplicity of competitors, large and small, at all levels of competition, and that the elimination or impairment of the smaller members of the competitive array would be detrimental to the public interest. This Court has instructed reviewing courts to bear these basic underlying legislative goals in mind when rendering decisions in the antitrust field. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 16 L. Ed. 2d 765 (1966).

Here, the Court of Appeals has held that when the Federal Trade Commission entered its order of August 1964, by which it not only refused to stay the cease and desist order, but also flatly refused to investigate respondent's competitors, that agency simply chose to ignore the statutory purpose of protecting, rather than impairing the competitive opportunities of respondent, a small competitor at the seller level of competition.

Now, in its brief before this Court, petitioner claims the court below usurped the Commission's function and made a determination which the law properly reserves to the Commission's administrative discretion by considering the detrimental effect which immediate enforcement might have at the seller level. It accuses the court of appeals of making an evaluation of "competing economic interests", a phrase which, although unexplained in the FTC's brief, obviously has reference to an analysis of the probable impact at the seller, as opposed to buyer, level of competition which might flow from enforcement of the order. (FTC Br., p. 8)

What is overlooked in the FTC's brief is that when it claims the court below erred by "undertaking for itself" this evaluation of "competing economic interests", petitioner is in effect defining the duties which were properly

encumbent upon the Commission in the situation under review.

But where is the Commission's evaluation of competing economic interests in place of which the court wrongfully substituted its own determination? Where in its order denying the stay does the FTC determine that adverse effects deemed probable at the buyer level of competition between respondent's customers outweigh any possible competitive impairment of respondent at its own seller level of competition? The answer is, the Commission did not even consider the problem. The sole grounds which the Federal Trade Commission advanced in support of its order denying the stay was that it did not feel inclined to expend its resources in investigating respondent's competitors, because respondent had not supplied it with every element of a *prima facie* case. No weighing of economic interests appears in the Commission's order, the Commission simply failed to consider how enforcement of its order against respondent might contribute to an increase in the already high degree of concentration in this industry. (R. 62-3).

Respondent agrees that if the Commission had actually made the evaluation now described in the FTC's brief, that is to say, if the Commission had ascertained the essential facts, analyzed those facts, and then determined that the cease and desist order should not be stayed because any possible competitive impairment to respondent occasioned thereby would be outweighed by the adverse effects reasonably predictable in the secondary line if enforcement of the cease and desist order were to be delayed, then the Commission would have performed its administrative function in deciding the most appropriate method of carrying out its statutory responsibilities.

But, how can the FTC properly criticize the court of appeals for *"substituting"* its own discretionary determination for that of the Commission when the Commission itself never considered the problem?

Of even more significance is the total failure of the FTC's brief to do more than *merely suggest* to this Court that there might be serious consequences among respondent's customers resulting from staying the cease and desist order. Why this should be so is never explained.[2] Yet, this suggested detrimental effect, even though not referred to by the Commission in its order of August 1964 and not explained even in the FTC's brief to this Court, is supposedly sufficient to render the court of appeals' decision herein erroneous. The FTC is hardly in a position where it can afford to cast a spotlight on

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[2] Respondent has only a minor share of the plumbing fixture market. (R. 572) If it were to cease granting truckload discounts this would hardly alleviate the necessity of its smaller customers still being required to compete with the customers of other plumbing fixture manufacturers still granting such allowances. If, on the other hand, respondent were to effect compliance by following the course which the FTC brief describes as preferred (FTC Br. p. 24) and cease selling to its smaller non-truckload buying customers, it is indeed difficult to perceive how this would benefit those smaller customers.

The terminated customers would have but two practical alternatives. They could discontinue reselling plumbing fixtures, which is highly unlikely, or they could buy such products from another discriminating manufacturer and pay the discriminatory higher non-truckload price to a competitor of respondent. Under these conditions, how would enforcement of this order against respondent benefit the small non-truckload buyers?

Conversely, at the seller level, regardless of which course respondent elects it will lose customers to those competitors continuing to grant truckload discounts.

any possible adverse effects on competition at the secondary level. After all, in refusing to investigate respondent's competitors, the FTC displayed not one whit of solicitude for the customers of the remaining manufacturers of plumbing fixtures who were paying, not the 10% differential for which the FTC condemned this respondent, but differentials "far in excess" thereof. (R. 572)

Respondent submits that where it is clear to a reviewing court, that as a result of an administrative agency's action an effect, not only unintended by the statute, but definitely contrary to the purpose of the statute, will be brought about, and where, as here, no countervailing salutory effect is apparent from the agency's action, the reviewing court must act to correct the situation.

B. The FTC's action in denying the requested stay was an abuse of discretion because the flat refusal to investigate respondent's competitors precluded the Commission from obtaining essential information prerequisite to the proper exercise of its administrative discretion.

In the case of *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411 (1958), this Court, in considering whether the FTC's cease and desist order at issue in that case should have been stayed pending the prosecution of that respondent's competitors, ruled:

> "Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, *whether such appearances reflect fact* and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment *are questions that call for discriminatory determinations by the administrative agency.*" (355 U.S. 411, at 413, emphasis supplied)

This language clearly indicates this Court's view that in a situation such as that which was present when respon-

dent petitioned for a stay, the Commission has a *duty* to investigate and find out whether an allegedly illegal practice is in fact industry-wide in scope. No other interpretation can be applied to the Court's "whether appearances reflect fact" terminology.

In this case respondent went much further than merely making a naked accusation that its competitors were granting truckload discounts. It attached documentary proof in the form of bulletins and price lists issued by all its major competitors which showed that they were granting such discounts. The authenticity of these documents has never been challenged.[3]

Obviously, price lists and price bulletins do not in and of themselves prove that the manufacturers issuing them are violating the price discrimination law. Respondent has never contended to the contrary. But, certainly these documents, at the very least, did serve to create the "appearance" that the granting of truckload discounts, the practice which the Commission had challenged when done by respondent, was industry-wide. Faced with such a showing, the Commission made no attempt to ascertain *whether such appearance reflected fact,* instead it chose to do just the opposite and refused to take any action. It thus precluded itself from obtaining the very information

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[3] This documentary material has been reproduced in the printed record, R. 519-555. The only challenge now raised by the FTC is that respondent granted truckload discounts on its entire line, whereas its competitors restricted such discounts to a few items (FTC Br., pp. 3, 16-17). This claim finds no support in the record and is flatly contradicted thereby. If respondent's truckload discount bulletins are examined, it will be noted that respondent always limited the availability of these differentials to certain specific items (Respondent's Exhibits 16-28b, R. 452-453, R. 556-567), not its entire line.

which it would necessarily have to have in order to properly exercise its discretion in determining whether the most efficacious remedy consonant with the underlying purposes of the Clayton Act was to enforce the cease and desist order immediately or to grant the requested stay.

It is manifest that an administrative agency cannot legitimately exercise the discretion entrusted to it in ignorance. The whole concept of administrative discretion presupposes an expert body armed with knowledge of the facts. An administrative agency, therefore, abuses that discretion when it attempts to exercise it in the absence of knowledge of the facts.

Although respondent had quoted this Court's ruling in *Moog* delineating the Commission's duties in its answer to the petition for certiorari, the FTC's brief makes no direct reference to this portion of that decision. It is interesting to note, however, that instead of making a direct attempt to reconcile the Commission's refusal to investigate with the previously quoted portion of this Court's *Moog* holding, the FTC instead tries to rearrange the basic facts and argues that the Commission did not refuse to investigate these competitors at all, and that it actually did make such an investigation. In the Argument section of the FTC's brief, the following statement appears:

> ". . . , after examining respondent's petition and the affidavits *and general sources of information about the industry available to it (such as the file of complaints by members of the public)*, it was reasonable for the Commission to conclude that such investigation would not represent a profitable or useful expenditure of its limited investigative resources." (FTC Br. p. 21)

The italicized portion of the above quotation is clearly a statement of fact, but no citation to the record is made in support of it. Respondent would note, however, that in issuing its order rejecting respondent's request for a stay, the Commission made no reference to its having undertaken the steps which are in italics above, nor did it give any hint as to what, if any, information it gleaned as a result thereof, nor to what extent such information may have influenced its decision to deny the requested stay. (R. 62-63). Respondent concedes that the examination and consideration by the Commission of pertinent information, even though *de hors* the record, under the circumstances then present, would have been a proper undertaking for an enforcement agency and it makes no challenge to the propriety thereof. The law, however, is clear that in judging the propriety of an agency's actions, the courts must limit their review to the grounds stated by the agency for its acts. Thus, this Court in *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962), stated:

> "The [reviewing] courts may not accept appellate counsel's post hoc rationalization for agency action; . . . [precedent] . . . requires that an agency's discretionary order be upheld if at all on the same basis articulated in the order by the agency itself: A simple but fundamental rule of agency law . . . is . . . that a review court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such actions solely by the grounds invoked by the agency. . . ." (371 U.S. 156, at 168)

This eleventh-hour reference to facts previously unmentioned as grounds demonstrating the "reasonableness" of the Commission's denial of the requested stay is not without significance, for certainly this demonstrates a doubt on the part of the FTC now as to the adequacy of

the reasons invoked by the Commission for its action of August 4, 1964.

It is clear, very clear, from the statement made by the Commission in rejecting the requested stay that the Commission had *not* investigated to determine whether petitioner's competitors were also violating the law, because the Commission unequivocally stated that it would not conduct such an investigation. (R. 62-63)

This late change of position is made for the obvious reason that FTC counsel now realize that if the Commission lifted not a finger in an effort to ascertain whether or not respondent's competitors were violating the law, then that agency's action could not be reconciled to this Court's mandate set forth in the above-quoted passage of the *Moog* decision. The FTC would then be left in a hopeless position to justify an attempted exercise of administrative discretion in a situation where it is clear that the Commission not only did not have, but also refused to obtain the necessary information upon which to base such a determination.

C. The Commission's refusal to grant the requested stay was an abuse of discretion because that refusal was arbitrary when judged in the light of the Commission's own announced standards.

The Commission in its official policy statement contained on the first page of its annual report to the Congress for the year 1964, the year in which the complained of action took place, made the following declaration:

> "Unprecedented emphasis on the use of industry guidance methods as alternatives, whenever possible, to formal adversary actions characterized the work of the Federal Trade Commission during fiscal 1964.

In pursuing this policy, the Commission moved toward its original purpose of guiding business into legal channels without bringing down upon it the 'menace of the law'.

• • •

"*Whenever a law violation was identified, the Commission, instead of applying the simple (and superficially vigorous) method of halting individual violators, undertook to find out if their competitors were doing likewise.* If they were, the Commission then decided how best this competitively generated evil could be eliminated with the least delay." (Annual Report of The Federal Trade Commission (1964), p. 1, emphasis supplied.)

This Commission policy pronouncement and the Commission's action denying the stay are simply irreconcilible.[4] Here the Commission tells Congress that in every instance when it identifies a law violation it makes an effort to determine whether the violation is prevalent throughout the industry. According to the Commission, it undertakes this task in all cases as part of its normal operating procedure, not just those where a respondent petitions it to do so. The Commission has offered no explanation as to why this procedure was not followed in this case. The arbitrariness of the Commission's departure from this general standard is further aggravated by the circumstance that respondent had requested that the announced procedure be followed, and had produced evidence showing the challenged practice was widespread.

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[4] For a detailed comment approving the lower court's decision in this case wherein the author stresses this irreconcilibility between the Commission's announced policy and its action of August 4, 1964; see: Agency Enforcement Discretion, 41 N.Y.U.L. Rev. 964, at 966 (1966).

The very epitome of arbitrary governmental action is to depart from an announced general standard or procedure in a particular case in the absence of some good and sufficient reason indicating that an exception should be made. Justice, whether it is dispensed by a court or by a quasi-judicial body such as the Federal Trade Commission, should be done in an even-handed manner. In the case at bar no sufficient reason has been advanced to justify the FTC's action and its refusal to grant the stay was, therefore, arbitrary.

This policy statement which the FTC submitted to Congress in 1964 is far from an isolated pronouncement on this subject. Time and time again the Commission itself and the various members of the present Commission have gone on record reiterating this Commission policy of approaching industry-wide problems on an industry-wide basis and have offered convincing reasons for the Commission's adoption of that policy.

The Commission has stressed in statements to the Congress the inherent unfairness of enforcing the Act on a single competitor basis. In a Commission statement prepared for the House Committee on Appropriations, the FTC made the following report:

> "In enforcing the Robinson-Patman amendment to the Clayton Act . . . the FTC is tackling the problems on an industrywide basis if possible.
>
> "A key to the Commission's new approach is more careful planning of how best to cope with illegalities. Instead of shooting first and analyzing later, criteria are being further developed in our case selection to assure that we are not simply spending money and racking up statistics without commensurate results. *Simple fairness to competing business demands:* First,

an analysis of the illegality to determine its character and prevalence; second, a determination of the amount of public interest involved; third, that consideration be given to correcting, if possible, the illegality by illuminating it for all concerned or by accepting from violators their assurance the violation will be discontinued; and, finally, should these informal efforts fail (or be deemed insufficient), then to strike quickly at the *defiant* violator with the full force of the law. Such planning will enable the F.T.C. to husband its adversarial resources to attack hardcore violators. . . .'"[5] (Emphasis supplied)

The present Chairman of the Federal Trade Commission, Paul Rand Dixon, in testifying before this same House Subcommittee of the Committee on Appropriations, elaborated on this policy as follows:

"We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, *the first thing they are to determine is whether or not this is an isolated situation* that has come to our attention *or whether it is something that is engaged in competitively by all the competitors.* If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . .

"Historically, the Commission was wedded to the procedure of taking our customers or their cases as they came. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case

[5] FTC Statement, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 408-409. See also: Hearings before Subcommittee of the Committee on Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.

method that proceeding against one, the others, if it affected them, would take notice and follow suit. It just didn't work that way. . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country very rarely can a man be his brother's keeper. I think this is the basis of law. *We are trying to enforce our law in the American way, equitably and fairly.*'"[6] (Emphasis supplied)

On another occasion Chairman Dixon explained the reasons for the Commission's enforcement program in an address before a group of American businessmen, stating:

"It must be recognized that *some illegal practices are so widespread within an industry that to single out a few of the sinners would be unfair.* Simple justice would dictate that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)[7]

In another address, Chairman Dixon has reiterated these sentiments, and pointed out, "The man who is willing to comply with the law simply can't afford to if a competitor is allowed to go on violating it."[8]

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[6] *ibid,* note 5, at 404-405.

[7] Paul Rand Dixon, an address before the Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 16, 1965.

[8] *Voluntary Law Enforcement: An Approach to "Administrative" Delay,* an address by Paul Rand Dixon, before the Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D.C., March 17, 1965. See also an address by Commission-

Commissioner Mary Gardiner Jones of the present Commission, in an address before the Bar Association of the District of Columbia (February 25, 1965) stated as follows:

> "Industrywide enforcement of the law is almost a constitutiontal imperative as a matter both of fairness and for equality before the law. It is clear that we have no right to and could not permit some violators to go free while prosecuting others."

The court below relied upon this statement by Commissioner Jones, and the obviously valid opinion therein expressed, in reaching its decision in the instant case.

A review of Robinson-Patman Act proceedings before the Federal Trade Commission indicates that this announced policy has been consistently followed by the Commission except for this case.[9] Certainly it cannot be

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[8] (Continued)
er Everett MacIntyre, *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965, wherein the quoted view of Chairman Dixon is endorsed by this member of the present Commission.

[9] Appendix B (FTC Br., p. 33) lists six Robinson-Patman Act decisions in which stays of orders have been denied. In *none* of these cases did the Commission enter an order to cease and desist against only one company and refuse to investigate others in the same industry engaged in the same pricing practice. Respondent respectfully subimts that it is an imposition on this Court for the Commission to cite cases such as *United Biscuit Co.,* 1963-65 Tr. Reg. Rep., Tr. Binder, § 16,749, as comparable to the case at bar, when its official reports show that United's major competitors were all under substantially identical orders entered either before or simultaneously with entry of the order by the Commission against United. See: *National Biscuit Co.,* 50 FTC 932, *Sunshine Biscuit Company,* 52 FTC 110,

seriously suggested that the eleven complaints, all issued on the same day challenging the same practice on the part of magazine publishers, occurred through sheer coincidence.[10] Similar treatment has been accorded to competitors in the Florida citrus fruit industry, an industry in which the Commission has issued over ninety cease and desist orders;[11] the same is true of the garment industry wherein the Commission has obtained 220 cease and desist orders;[12] the same is true in the carpet industry where eleven competitors were placed under cease and desist orders;[13] and the tobacco industry where five major competitors were placed under cease and desist orders;[14] the same is true of the electric shaver industry where four cease and desist orders have been issued;[15] in the

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[9] (Continued)
Schultze & Burch Biscuit Co., and *Robert A. Johnson Company*, 1963-65 Tr. Reg. Rep., Tr. Binder, §16,749. The same situation prevailed with regard to competitors of Southern Fruit, see Note 11, *infra*, and Dayco, an auto parts case. As to *Pacific Molasses*, that company's only competitor was already under a cease and desist order. 1963-65 Tr. Reg. Rep., Tr. Binder, §16,981. In *Graber Mfg. Co.*, the FTC has not yet entered an order (citation not possible). As to *Chun King Sales*, some three years after consenting to the entry of an order (58 F.T.C. 81), Chun King requested a stay in what appears to have been an obvious attempt to avoid a penalty proceeding for violations of the final order. (See: Trade Reg. Rep., Vol. 3, §9701,40 (1965) reporting penalties of $70,000 for violations of the order imposed on Chun King.)

[10] 57 F.T.C. 13 through 52.

[11] Table of Commodities Indexes, Vols. 57 through 60 of the FTC Official Reports.

[12] 1963-65 Trade Reg. Rep., Transfer Binder §§16,468, 16,534, 16,702.

[13] 1963-65 Trade Reg. Rep., Transfer Binder §16,800.

[14] 56 FTC 221, 258, 263, 269 and 275.

[15] 55 FTC 655, 665, 682 and 1017.

toy industry to date the Commission has issued at least 16 cease and desist orders;[16] and the seafood industry, where at least 23 cease and desist orders have been issued against various competitors.[17]

The cited proceedings are by no means all inclusive but they serve to clearly demonstrate that the FTC is enforcing the Robinson-Patman Act on an industry-wide basis. Thus, the Court of Appeals decision in this case does not require the FTC to embark upon some new or radical procedure. It merely calls upon that Agency to consistently apply the very policy which it has already been following. The FTC has made it clear that it is of the opinion that industry-wide enforcement is the policy best calculated to achieve the ends contemplated by Congress. Moreover, the FTC in other cases has stayed the effective date of a cease and desist order entered against a single competitor pending proceedings on an industry-wide basis. Thus, in *Atlantic Products Corp.* and *Atlantic Products Sales Corp.*, FTC Doc. 8513, ... FTC ..... (1963), 1963-1965 Trade Reg. Rep., Transfer Binder §16,676, the Commission, expressly recognizing the necessity for making a discretionary determination on this point in a case presenting a similar situation to the one at bar, held as follows:

> "Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order so that a general practice may be dealt with more comprehensively, may involve consideration of circumstances going beyond those reflected in the particular record. In the circumstances here we are inclined to withhold

[16] 61 FTC 629.

[17] Table of Commodities Index, Vol. 55 of the FTC Official Reports, at p. 2166.

entry of a cease and desist order against the instant respondent pending the outcome of the pending industrywide proceeding."

In the case at bar respondent never requested the Commission to go so far as it agreed to do in the above-quoted *Atlantic Products* case. All this respondent requested was that the Commission investigate its competitors and then determine whether immediate enforcement, as opposed to delayed enforcement pending industry-wide investigation, was the best course to effect compliance with the Robinson-Patman Act in the plumbing fixture industry. The Commission refusal to do so was arbitrary.

2. There is no conflict between the Court of Appeals decision in this case and this Court's prior decision in Moog Industries, Inc. v. F.T.C.

In its brief the FTC takes the position that this Court laid down a well-nigh inflexible rule in the consolidated cases of *Moog Industries, Inc.* v. *FTC and FTC* v. *C. E. Niehoff & Co.*, 355 U.S. 411 (1958), to the effect that courts of appeals may not interfere with FTC decisions denying stays of the effective dates of cease and desist orders. But, in its treatment of this Court's *Moog-Niehoff* decision the Commission overlooks entirely the factual background present in those cases which differs radically from that present in the instant matter.

Moog and *Niehoff* were just two of a large number of cases involving annual volume rebates in the "auto parts" industry. The Commission at the time those cases reached this Court had already investigated the auto parts industry, as an industry, and brought cases against those companies found to be granting annual volume rebates. Thus, in a brief filed on behalf of the Commission with

this Court in *FTC* v. *C. E. Niehoff & Co.*, October Term 1957, Case No. 110, the Commission told this Court:

> "Respondent [Niehoff] is not in a position to claim that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against [Niehoff] the Commission filed 14 Section 2(a) complaints against members of the automotive replacement parts industry. Courts of Appeals have affirmed the . . . orders issued in six of these proceedings. . . . Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors."

Respondent would note further that before this Court's decision in *Niehoff* was handed down a third one of Niehoff's competitors was already under an order and three others had been named in FTC price discrimination complaints. See: *Standard Motor Products*, 54 FTC 814; *Guaranteed Parts Co., Inc.* 53 FTC 433, and *Thermoid Company*, 55 FTC 518. It would indeed be difficult to find an industry subjected to a more vigorous *industry-wide* effort on the part of FTC to bring about regulation under the price discrimination statute than the auto parts industry in the 1950's.[1]

In contrast, the FTC's investigation in the case at bar was completed prior to August 4, 1960 and concerned respondent's pricing practices for the years 1957 through 1960. (R. 1-3). A decade has elapsed since the onset of the pricing practices which are the subject of this suit, but there has not been a single other complaint issued in the plumbing fixture industry. Here, then, is the first dis-

[1] See: Agency Enforcement Discretion, 41 N.Y.U. L. Rev. 964, 968 (1966), wherein the commentator lists the names, filing dates and docket numbers of the numerous FTC Robinson-Patman cases in the auto parts industry.

tinction in the factual situation presented by this case as contrasted to that in the *Moog-Niehoff* cases.

Another point which the FTC fails to mention is that the relief sought by *Niehoff*[2] was the staying of the effective date of the cease and desist order against it pending the successful prosecution of its competitors. In short, *Niehoff* was claiming, not that its competitors were being ignored by the FTC, but that the FTC order would go into effect against it before similar orders went into effect against its competitors. Respondent has never requested this relief. All respondent has asked is that the FTC investigate its competitors so that it can make a knowledgeable determination as to whether the proper course consonant with the statutory purpose is to enforce the order immediately or stay it. Therefore, when this Court was considering the propriety of the court of appeals having stayed enforcement of the order against *Niehoff*, the paramount issue was whether the Federal Trade Commission or the court of appeals was to decide the timetable for enforcement of orders in the auto parts industry. There was therefore no question in *Niehoff* concerning the Federal Trade Commission's refusal to investigate *Niehoff's* competitors—it had investigated and, obviously, it was in a position to make a knowledgeable determination as to how best to regulate the auto parts industry. In that industry the decision was to seek immediate enforcement of the Commission's order. Respon-

[2] C. E. Niehoff & Co. had raised the question of staying the order at the Commission level whereas Moog Industries, Inc. had not. This Court ruled that Moog was in no position to raise it since it had not exhausted its administrative remedies. In this brief, therefore, respondent limits its discussion to the C. E. Niehoff & Co. situation.

dent submits that there is a vast difference in a situation where a company's only complaint is that "the Commission came after me first," which was Niehoff's situation, and the situation in which this respondent finds itself, where it can justly complain "the Commission has attacked only me and decided to ignore my competitors."[3]

One leading authority in the field of administrative law, Professor Kenneth Culp Davis, in a recent comment, Judicial Control of Administrative Action, 66 Columbia Law Review 635, at 649 (1966) discusses this problem of abuse of what he terms "prosecutorial discretion", and states, "But I hope and expect the Court will interfere when it finds that such discretion has been abused. The law of the present and of the future is likely to be found in a decision just rendered by the Seventh Circuit to that effect". (citing the case at bar)

Professor Davis explains the need for judicial review in this area as follows:

> ". . . , the power not to prosecute is almost without protection of any kind; ulterior pressures can be applied without notice to parties with interests on the other side, without anything in the nature of a proceeding, without announcement of the decision, without any public view of what is going on, without

[3] The FTC claims that this respondent's showing was not as strong as the showing made by *Niehoff*, since in that case Niehoff claimed it would have to go out of business if it were required to comply with the order against it before its competitors were placed under orders. (FTC Br., p. 13). While it is true that *Niehoff* made this dire prediction in the cited case, this should hardly be a determinative factor in the present case. Surely, the Commission does not mean to suggest that only in cases wherein economic extinction is imminent should a respondent's plight be considered.

any record of what is done or undone, without findings, without reasons, without any real or pretended adherence to precedents, without legislative checks, and without executive check. Why not have a judicial check to the extent that clear abuses are brought to the attention of reviewing courts?

I predict that the court will become increasingly concerned with abuses of the prosecuting power. They should." (*supra*, at 649-50).

3. The court below did not err by reserving its judgment on the vadility of the cease and desist order.

On page nineteen of the FTC's brief the contention is made that the court below erred by failing to first pass on the cease and desist order before considering whether enforcement of that order should be stayed.

The Commission claims that it may be discommoded should it now bring "lengthy industry-wide proceedings in the pattern of the present case" and later have the court of appeals declare its order in the case at bar invalid. The Commission expresses fear that "a serious and unnecessary waste of the Commission's resources" might thus be occasioned.

This contention, when stripped to its bare essentials, means that all the official policy statements and public pronouncements of the Commission concerning "constitutional imperatives", "simple justice", "law in the American way, equitably and fairly", "simple fairness" and "competitively generated evil", should be considered meaningless. What the Commission is asking for in this Court is a test case, wherein it will use for its guinea pig one of the smallest members of the industry. It is clear that the Commission believed there was no necessity for a guinea pig in the magazine, tobacco, citrus

fruit, shaver, or garment industries where industry-wide enforcement was sought long prior to the review of any such case by a court of appeals. The Commission in its brief does not point to one such test case in the past, nor allude to any unique circumstances present in the plumbing fixture industry which would warrant this unusual course.

This same contention was presented in the Commission's petition for certiorari (Pet., p. 10, note 10), but it has undergone a not too subtle change in the FTC's present brief. Thus, in its petition the Commission claimed that its only fear was that the "agency's substantive theory" might be held erroneous. Respondent, in its opposition, had agreed that the Commission's argument might have been meritorious "if in the proceeding below respondent had challenged the Commission's substantive theory of violation on the ground of an erroneous legal theory." (Brief in Opposition, p. 21, note 1). But, respondent went on to point out, that the thrust of its challenge as to the validity of the order was basically centered on the sufficiency of the evidence to support the findings. This, in effect, was a challenge to the FTC to demonstrate to this Court precisely what new or novel legal theory was presented in the instant case. No answer to this challenge appears in the FTC's current brief. Instead, the FTC just adds a little something more to its contention. Now, it is claimed that in addition to fearing that its "substantive theory" may be declared erroneous, it also expresses doubts as to whether it applied the "proper standards of evidence" in its case against respondent. (FTC Br., p. 19)

Even assuming the latest contention has some validity, in the sense that the Commission's evidence may be in-

sufficient, how could a failure of evidence in the instant case affect the result in some other proceeding in this industry? For example, would a failure to prove the existence of competition between certain of respondent's customers mean that no competition could be proven to exist among some other manufacturers' customers—obviously not.

Respondent submits that the validity of the FTC's entire argument on this point is at best theoretical, but what the FTC has not done is to apply flesh to the theoretical skeleton it has raised. Respondent respectfully submits that this argument should be disregarded, especially in view of the Commission's actions in other industries and the statements and pronouncements of the Federal Trade Commission (*supra,* Section 1:C.), which clearly do not set up as a contingency the successful prosecution of a test case as a prerequisite to industry-wide enforcement of the Robinson-Patman Act.

4. The claim that the FTC is now powerless to investigate respondent's competitors because of pending Department of Justice proceedings under the Sherman Act is wholly lacking in merit.

Respondent did not remain idle following the Commission's refusal to grant the relief requested in its petition for a stay. It noted the categories of information which the Commission had stated in its order of August 4, 1964 would be necessary before that agency would be constrained to commence an investigation of respondent's competitors, and it went about gathering and submitting such information to the Commission.

With regard to two of its competitors, respondent furnished the names of their customers in a dozen different trading areas of the country. (FTC Br. Appendix C, pp.

52-3) Thus, by the time the case reached the Court of Appeals, the FTC, based on this additional information was forced to admit in its brief," . . . petitioner [respondent] submitted specific information to the Commission tending to show current violation of Section 2(a) by two competitors."[1] (FTC Brief before the 7th Cir., p. 52) Since respondent had met the Commission's terms and supplied the required information, at that point the reasons given by the FTC in its order of August 1964 denying the stay, at least as to these two competitors,[2] were no longer valid and acknowledged to be so by the FTC. It was therefore necessary, if the Commission was to justify its continuing refusal to investigate respondent's competitors, to find yet another reason for its reluctance to take any action. The FTC therefore advised the Court of Appeals that, even though the Commission had the necessary information, it would not then take any action because an investigation would conflict with a matter then being conducted by the Antitrust Division (R. 574). In its brief before the Court of Appeals, the FTC never explained to that court or to respondent why such a conflict would arise.

Now, in its brief before this Court, the FTC explains that the alleged conflict involved the question of witness

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[1] In its current brief the FTC attempts to deny that it made this admission in the lower court. The FTC now states, "Even assuming, as the court below apparently did (R. 574), that respondent had supplied sufficient information . . . to indicate that two of its competitors were offering illegal discounts . . ." (FTC Br., p. 22). The court didn't make any assumption, it accepted at face value the admission made in the Commission's brief (R. 574).

[2] The two competitors were the largest and second largest manufacturers of plumbing fixtures and their market share accounted for approximately 47% of the industry total (R. 572).

immunity. The Commission advises this Court, "Surely the Commission should not be compelled to engage in any activity such as the use of compulsory processes, conferring immunity upon witnesses—which would have interfered with such a proceeding." (FTC B., p. 23)

If practicalities are considered however, this immunity excuse simply evaporates. In the first place, the court of appeals did not hold that the Commission was required to successfully complete the prosecution of respondent's competitors before it could enforce its order against respondent, nor had this respondent ever requested such relief. What the court of appeals found erroneous in the Commission's denial of the stay was its refusal to *investigate*. Thus, the court held:

> "An investigation of an industry is germane to a proceeding before the Commission, and it has a duty to so investigate in a proper case. . . . The Commission was the proper forum to receive and act upon the result of such an investigation . . . " (R. 575)

What danger there was of conferring immunity *by investigating* is therefore the problem to be considered.

The real answer to this immunity contention is that the FTC has at least four investigative techniques at its disposal to conduct investigations of possible violations of Section 2(a), none of which involve the taking of testimony from individuals or the requirement that individuals produce evidence.[3] Thus, the FTC could have attempted to obtain this information by requesting a voluntary submittal from each of the competitors, a method which the FTC in its Rules of Procedure states to be its preferred

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[3] The immunity provisions are strictly limited to natural persons and have no application to corporate entities. 15 U.S.C. 49, reprinted, Appendix B, *infra*, p. 3a.

manner of conducting investigations. (See: Subpart D, Sec. 1.31, Rules of Practice of the Federal Trade Commission; Appendix A, page 10a, infra.) If these were refused, the FTC could have compelled "submission" of this information from each corporate competitor by issuing an order for special reports under Section 6 of the Federal Trade Commission Act.[4] 15 U.S.C. 46(b) (reprinted, Appendix B, p. 2a, *infra*). As a third alternative, the Commission could have obtained the information it needed by the serving of subpoenas *duces tecum* on each of the corporate competitors. Finally, the FTC could have exercised its power under Section 9 of the FTC Act which enable it to obtain access, for the purposes of examining and copying, to any documentary evidence of any corporation under investigation. 15 U.S.C. 49, (reprinted, Appendix B, p. 2a, *infra*).

Regardless of which of these four methods the Commission chose, none would have posed an immunity problem with regard to the Antitrust Division's proceedings, because *no individual would have been required to give any testimony* in the FTC's investigation. Respondent can speak from first-hand experience, because not a single individual in its employ was compelled to testify or

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[4] See: *Problems of Enforcement Procedure and Remedy under the Robinson-Patman Act*, 17 ABA Antitrust Section (1960) 427, at 431, wherein the then General Counsel of the Commission stated:

> "Reports under Section 6(b) of the Federal Trade Commission Act [are] the really significant compulsory process, which has proven to be particularly adaptable to Robinson-Patman Act investigations.
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> • • •
>
> ". . . in reports under Section 6(b) we likely have found 'the weapon' so necessary to effect prompt, efficient, industry-wide enforcement of the statute."

See also: *St. Regis Paper Co.* v. *U. S.*, 368 U.S. 208 (1961).

produce evidence by the FTC in its pre-complaint investigation of respondent's pricing practices.

The total lack of merit to the FTC's contention as to a possible conflict comes vividly into focus when it is considered that the FTC in the very same letter (FTC Brief, Appendix C p. 55) wherein it was first stated that a possible conflict with the Department of Justice might arise if it were to investigate respondent's competitors under Section 2(a), it admitted that at that very time the Commission was conducting an investigation of one of the plumbing fixture manufacturers for possible violations of Section 2(d) and Section 3 of the Clayton Act, as well as Section 5 of the F.T.C. Act. The Commission ventures no explanation to this Court as to why those investigations could be conducted without danger of conferring immunity upon individuals, yet on the other hand, investigations for 2(a) violations would have such a result.

The FTC also suggests (FTC Br., p. 22) that a 2(a) Commission investigation would have been contrary to the Congressional intent because the Commission and the Department of Justice should function as effective "partners", rather than "rivals". An effective partnership in the enforcement of the antitrust laws, respondent respectfully submits, is not achieved when the Commission refuses to take any action to determine whether a section of the antitrust laws, the enforcement of which is primarily its responsibility, has been violated, merely because its partner is conducting an investigation in the same industry concerning a possible violation of a different antitrust statute for which the other agency has the sole enforcement responsibility. In such a situation one of the partners has obviously abdicated the duty imposed upon it by the Congress, which is the very antithesis of an

effective, coordinated antitrust enforcement program by both agencies.[5]

CONCLUSION

For all the foregoing reasons respondent prays that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

Respectfully submitted,

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[5] The agreement between the two agencies specifically recognizes that each agency must make an "independent" decision concerning the investigations each will undertake. *Report of the Attorney General's National Committee To Study the Antitrust Laws* (1955), page 376, note 53.